IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 269.

JOSEPHINE DESERANT, ADMINISTRATOR OF HENRI DESERANT, JULES DESERANT, AND HENRI DESERANT, JR.,
Plaintiff in Error,
vs.
CERRILLOS COAL RAILROAD COMPANY.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The statutes of the Territory of New Mexico contain the following:

> Sec. 3214. Whenever the death of a person shall be caused by the wrongful act, neglect or default of another, although such death shall have been caused under such circumstances as amount in law to a felony, and the act, or neglect, or default, is such as would, if death had not ensued, have entitled the party injured to maintain an action

and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured.

Sec. 3215. Every such action as mentioned in the next preceding section shall be brought by and in the name or names of the personal representative or representatives of such deceased person, and the jury in every such action may give such damages, compensatory and exemplary, as they shall deem fair and just, taking into consideration the pecuniary injury or injuries resulting from such death to the surviving party or parties entitled to the judgment or any interest therein recovered in such action, and and also having regard fo the mitigating or aggravating circumstances attending such wrongful act, neglect or default. The proceeds of any judgment obtained in any such action shall not be liable for any debt of the deceased. Provided, he or she shall have left a husband, wife, child, father, mother, brother, sister, or child or children of the deceased child, but shall be distributed as follows:

First—If there be a surviving husband or wife, and no child, then to such husband or wife; if there be a surviving husband or wife and a child or children or grandchildren, then equally to each, the grandchild or grandchildren taking by right of representation; if there be no husband or wife, but a child or children, or grandchild or grandchildren, then to such child or children and grandchild or grandchildren by right of representation; if there be no child or grandchild, then to a surviving brother or sister, or brothers and sisters, if there be any; if there be none of the kindred hereinbefore named, then the proceeds of such

judgment shall be disposed of in the manner authorized by law for the disposition of the personal property of deceased persons.

Comp. Laws of N. M., 1897, p. 810.

Under the provisions of this statute plaintiff in error instituted three actions in the district court of Santa Fe county, New Mexico, against the defendant in error, seeking to recover damages for the death of Henri Deserant, Jules Deserant and Henri Deserant, Jr., who had been employed as coal miners in the White Ash mine, situated in Santa Fe county, New Mexico, and who were killed by an explosion which occurred in said mine on Wednesday, February 27th, 1895, about ten forty-five o'clock in the forenoon.

Henri Deserant, who, at the time of his death was fifty-three years of age, was the husband of the plaintiff in error, and the father of Jules, who was fifteen years old, and of Henri, Jr., who was seventeen years old.

The declaration in each case contained five counts and for the purpose of this statement it seems only necessary to say the sufficiency of the allegations of the declaration has at no time been questioned.

Plaintiff in error relied upon specific acts of negligence, all of which are clearly within the issues of the case as made by the pleadings.

The defendant in error was engaged in operating the mine at the time of the explosion, and had, in addition to a large number of miners and other persons necessary to the conduct of its business, the following employes whose duties are more or less fully indicated by their titles: James Duggan, Mine Superintendent; John Donahoe, Day Foreman or Pit-Boss; (Donahoe was killed by the explosion); William Kilpatrick, Night Foreman or Pit-Boss; John

Deighton, Day Fire-Boss; J. W. Ray, Night Fire-Boss.

There were also "rope-riders," "mule-drivers," and "track-men;" and others, known as "company men," who were distinguished from the miners by the fact that they were paid by the day and worked under the orders and immediate supervision of the Foreman or Pit-Boss, while the miners or coal-diggers were paid by the ton and were subject only to general supervision by the foreman.

Defendant in error also had a mine inspector, Joseph Fletcher, who lived at Topeka, Kansas, and visited this, and other mines owned by it, periodically, for the purpose of inspecting and looking to the safety of the property.

The principal excavation of the mine, called the main slope, had been at the time of the explosion, excavated a distance of about twenty-nine hundred feet into the earth at an angle of about fourteen degrees from a horizontal, and excavations called "entries" were made from the main slope at intervals of about three hundred feet. There were seven of these entries on each side of the main slope, and the explosion took place in the fourth entry on the left side of the main slope, called by the witnesses "the fourth left entry."

Along and nearly at right angles to these entries, and on their upper side, working places called rooms were excavated. The openings into the rooms were started ten feet in width but, at a distance of about twenty feet from the entry, were made twenty feet wide, and were carried a distance of about three hundred feet up the vein of coal, or back towards the surface. The narrower portion at the beginning of the room is known as the "neck of the room."

The business of the miners was to remove the coal

in these rooms, load it on cars which ran on iron tracks, and bring it down out of the so-called rooms to the entry. It was there taken in charge by a mule-driver who with his mule-team hauled the car through the entry to the main slope, where it was attached to the "rope" by the "rope-rider," and was taken thence to the surface by a hoisting engine.

A twenty-foot body of solid coal was left between each of the rooms and openings, called "cross-cuts," were made to connect the rooms for purposes of ventilation.

The entire duty of the miner was to mine the coal and load it in a car. This involved drilling holes "into the solid," preparing the cartridge and putting it in place, tamping the hole and firing the cartridge at the regular firing time fixed by the company. The hours for firing were fixed, and any miner firing a shot at other than the times fixed was subject to discharge. The firing hours were, on the day shift, in rooms, twelve o'clock and five o'clock, and in the entries, nine, twelve, three and five o'clock.

The mine was ventilated by means of an exhaust fan, and to accomplish this method of ventilation what are known as slope air-courses or parallel air-courses were excavated on each side of the main slope and distant therefrom forty feet, and each of the entries had a parallel air course excavated in like manner at a distance of thirty feet below the entry.

The plan of ventilation contemplated that the exhaust fan, situated at a point on the surface where these parallel air-courses, after being connected together, could be operated upon by it, would cause the air to rush into the main slope, go thence to the bottom, where it would separate or divide and go to each side of the mine and traverse every working place in the mine, and that it would return to the

outer air at the fan, having gathered all the impurities and noxious gases in the mine.

In such a mine as this, and with such a method of ventilation as was here used, as the work progresses, the parallel air slopes, one on each side of the main slope, are driven, at a distance of about forty feet from the main slope. These air slopes or air-courses, are intended to afford channels for the return of the air to the surface. When the main slope has progressed so far that a circulation of air is necessary, an opening, known as a cross-cut, or break-through, is made from the main slope into the parallel air slope. The fan, pulling on the air slope, then draws the air down the main slope until it reaches the cross-cut, through which it rushes and returns to the surface through the air course. When the slope has been driven so far beyond the first cross-cut, or break-through, that the latter no longer serves its useful purpose of ventilating the working place, another cross-cut is made, and the first is stopped with boards or planks let into the coal on each side, near the middle of the cross-cut, and the spaces between the planks and slopes on each side, are filled with the refuse and waste of the mine. None of the stoppings are absolutely air-tight. When the slope has gone so far that the second cross-cut no longer is sufficient, that one is closed and another made. Substantially the same course is pursued in driving the entries on each side of the main slope. Each main entry has its corresponding air-course, sometimes called by the miners the back entry, driven below and parallel to the main entry, with cross-cuts or break-throughs to permit the circulation of the air necessary to life, and to the expelling of dangerous gases.

Now it is obvious that when the main slope or an entry progresses to a considerable distance beyond

the last open "cross-cut" and before the next one is made there will be a necessity of making the air go beyond that last cross-cut and up to the face of the main slope or entry where men are at work in the coal. In order to do this, canvas curtains, known to the miners as "brattice," are used. From the side of the main slope, or air-course, parallel to an entry, and a little above, or nearer the air than the last open cross-cut, heavy canvass is hung, perhaps half way across the slope or air-course, and then turned so as to follow the direction of the slope or air-course up to within a short distance of the working. The air, obstructed by this canvas in its effort to get to the open cross-cut and take the shortest course back to the fan, is guided by the canvas to its end, around which it rushes and back to the open cross-cut.

If a main entry, as in the case of the "fourth left" in this mine, is driven more rapidly than the accompanying air-course, the air coming up through the last cross-cut, would be turned in like manner by canvas or brattice and guided up to the face of the working.

In driving the "rooms" up from each main entry, in the coal, the same method is pursued. As each successive room is driven, cross-cuts are made back into the next preceding room. In this mine there appear to have been in each room not less than two such cross-cuts, when the rooms were driven up their full length. In order to prevent the return of the air back along the main entries, after it comes up from the air course or back entry, through the last cross-cut, heavy canvass curtains are hung across the main entries, which are not fastened at at the bottom, but are loose so as to permit the passage of mules or men.

It must not be supposed, however, that the air slopes, parallel to the main slope, are allowed to re-

main open for the return of the air after entries are driven on either side of the main slope. It will be apparent that if they were left open, the air, seeking the shortest course back to the fan, would never get to the working-places in the various entries and rooms. Theoretically, the air is intended to travel in one body on each side of the mine, except in a few places where it is "split," and to visit each working place. Practically, a very large percentage of the air leaks through the stoppings, or escapes through the doors as they are opened from time to time to permit the passage of men, mules and cars. This loss is shown by the air measurements on page 163 of the printed record. At page 68 of the printed record the witness, Fletcher, and at pages 169-70, the witness, Duggan, give detailed descriptions of course of the air through the left side of the mine, which may be intelligible by reference to the plat which accompanies the record.

All of the "slopes," "entries," "air-courses" and "rooms" in this mine were of the height of the coal, which was between five and six feet in thickness.

The fourth left air-course of the mine, that is, the air-course parallel to, and below, the fourth left entry, was driven through a swamp and had a sag, or low place, from two to three hundred feet in length, and there was a siphon pipe placed in it for the purpose of taking the water, which accumulated there, down to the bottom of the mine, from which place it was taken to the surface in water cars drawn up by the hoisting engine.

The fourth left entry was excavated a distance of 1,650 feet from the main slope. The fourth left air-course was 125 feet shorter than the entry.

The siphon pipe in the fourth left air-course did not work automatically, but required to be started by

hand. No witness was produced who had seen the siphon pipe working within a month before the explosion.

As soon after the explosion as men could go into the fourth left air-course, it was found to be practically full of water. The dimensions of the air-course, as fixed by the mine inspector, Fletcher, were six feet high and nine feet wide, with a slope from the upper to the lower side of from twelve to fourteen degrees. The water was within three inches of the top on the low side when the coroner's jury went into the mine four or five days after the explosion, although the hoisting engine had been working night and day hauling water during all the time between the explosion and the going down of the coroner's jury.

This body of water lay from two hundred to three hundred feet along the air-course.

There were eighteen rooms excavated along and above the fourth left entry, and the last cross-cut or opening between the fourth left air-course and the fourth left entry was necessarily more than 125 feet from the face of the entry, by which is meant the farthest point of excavation. The exact distance of the last cross-cut from the face of the entry does not appear.

The air was carried through this last cross-cut and thence along the entry to the face by means of a curtain called the "brattice," which extended to within fifteen feet of the face. The air passed around this curtain and came back on the other side of it to room 18 and went then to the various rooms and working places on that entry to room 6 where there was a break-through to the third left air course, and part of the air went from room 6 to the men working on the "plane" of the fourth left entry and from

there to the third left air-course through room 1 of the fourth left entry, while the remainder went through the break-through in room 6 up to the third left air-course and to the working places on the third left entry and so on to the fan. What is meant by the "plane" on the fourth left entry will be readily understood by an inspection of the map attached to the transcript. Between the points No. 3 L and No. 4 L on the map are shown excavations marked 1, 2 and 3. These constitute the "plane" of the fourth left entry and the black line entering at 1 and passing around the face of the "plane" and cut at 3 indicates the course of the air through the "plane."

Just above No. 4 L on the map is shown an obstruction in the passage called the "upraise." It is here that the board was knocked off a short time before the explosion to let air in to the men on the "plane," by which is meant a working place in the entry driven back towards the slope thus:

When a main entry is begun, it diverges at an acute angle from the main slope, going down in the coal for a short distance, and then turns to a direction nearly at right angles with the main slope, and is continued as far as is practicable or profitable. Track is laid from the main slope into the entry, and at a sufficient distance from the main slope to give space for a train, or in miners phrase, "a trip" of cars to stand, between the door, and the main slope, a door is placed for the purpose of preventing the passage of air from the main slope into the entry and thus injuriously affecting the circulation. A short distance beyond this door the first room is "turned," and driven back up the vein of coal. From this first room, numbered one on the entry, rooms are excavated back toward the main slope and the space between the number one room and the main

slope is called the "plane," and the rooms between the number one room on the entry and the main slope are called the rooms on the plane.

It should be borne in mind that these parallel air-courses furnished the temporary as well as permanent system of ventilation for the mine and that it became necessary, as the work of excavation progressed, to connect the slope or entry and its air-course by means of what are called break-throughs, which break-throughs in turn, as further progress was made, were filled up by means of what are called stoppings, and the sufficiency of the ventilating system depended to some extent upon the character of these stoppings. It is not contended that this explosion was caused by the character of the stoppings in use in the mine, but the facts that they were not air-tight and that air leaked through them, are circumstances of importance in the case; circumstances which, taken in connection with the other circumstances in the case, conclusively establish the theory of plaintiff in error as to the cause of this explosion. That theory is that the explosion was caused by the accumulation of a large body of water in the fourth left air-course which so interrupted the circulation of air in the fourth left entry that the insufficient quantity of air passing into room 8 of that entry did not go to the face of that room, but feebly passed around the brattice at a distance of twelve or firteen feet from the face, thus permitting the accumulation of a dangerous body of gas at the face of room 8 which continually increased until it passed beyond any danger signals which may have been put in the room by the fire bosses, and that Donahoe, Flick and Kelly entered the room on the morning of the exposion with naked lamps and ignited the gas before they saw or had an opportunity to see the danger signal. The death of these three

men was instantaneous, as if caused by a flash of lightning, and they entered the room through the cross-cut from room No. 9 and met the gas where Flick fell, he being further up the room than the others.

This was opposite the cross-cut by which they entered and certainly seventy feet from the face of the room. The fact that the air was not going to the face of room 8 of the fourth left entry at the time of the explosion is shown by the undisputed circumstances that there was no indication of flame at the face of that room nor within fifteen feet of the face.

It is, however, insisted on behalf of defendant in error that there would have been no air on the third left entry, unless it had first passed the face of room 8, and it is in this aspect of the case that the sufficiency of the stoppings and other ventilating appliances of the mine become important.

The contention that all the air in the third left entry had to pass the face of room 8 of the fourth left entry is completely overthrown by these undisputed facts:

> First—The slope leaked more than 60 per cent of the air before the air reached the bottom of it.
>
> Second—A large part of this air necessarily escaped through the doors and stoppings into the entries and parallel air-courses and after leaving the slope sought the shortest route to the fan.
>
> Third—Two weeks before the explosion an opening had been made through the stopping of an upper air-course to let the air go to the men on the plane of the fourth left entry, and this air, after leaving the plane, went through No. 1 room on the fourth left entry into the air-course of the third left entry without having passed

beyond room No. 1 of the fourth left entry at all.

Fourth—If there had been no obstruction in the fourth left air-course there would have been no occasion to open a stopping to allow the air from the upper air-course to pass to the men on the plane of the fourth left entry.

The evidence establishes beyond a reasonable doubt that the obstruction by water of the fourth left air-course and the accumulation of the gas in room 8 of the fourth left entry combined to cause this awful calamity and that the Mine Foremen and Fire Bosses knew of the existence of these dangers while the unfortunate victims had no knowledge or means of knowledge of their existence.

At the time of the explosion twenty-three men who were at work in the fourth left entry of that mine were killed by concussion; a man and a pair of mules in the third left entry were killed by "afterdamp," and four men who were at work on the plane of the fourth left entry came out uninjured. Fonr men who were working in rooms 14 and 15 of the third left entry were imprisoned in the mine for several hours by "afterdamp" which they encountered in both the entry and air-course of that entry, the same "afterdamp" which killed the two mules and their driver in the third left entry. These men were finally rescued.

Within two months before this explosion a double shift of men had been put to work in the mine, which means that the mine worked night and day. The ordinary daily routine of inspection of the mine, so far as it is material, was as follows:

There was a day fire-boss who inspected the mine for gas before the day shift went to work and a night fire-boss who did the same thing before the night

shift went to work. At the conclusion of his inspection, the fire-boss would take his position at what was known as the "Fire-Boss' Cabin" within the main slope near the mouth, and would advise each miner when he came in, as to the condition of his working-place.

No miner was permitted to go into the mine to work until advised by the fire boss that his place was safe.

If there was a very small quantity of gas in a miner's place and the miner was an expeaienced man, the fire boss would sometimes give him a safety lamp and tell him there was a little gas in his place; but if there was enough gas to be at all dangerous, he would tell the miner to wait at the switch for him, and he, the fire boss, would go down and get the gas out and see to the air before the miner was allowed to work. No miner had knowledge or means of knowledge as to the condition of the mine at other places than where he performed his work, and he relied on the fire boss to inspect the mine and advise him as to its safety.

This gas is explosive only when mixed in certain proportions with atmospheric air. It is lighter than air and is dispelled and carried off by a moving current of air whenever it encounters it, so that getting gas out simply means passing a current of air through the particular place where gas is found,

To make an inspection and visit the working places as they were at the time of the explosion, required the fire boss to travel four miles and 2060 feet under ground. The day fire boss went to work at from two to three-thirty o'clock in the morning and was usually back at the fire boss' cabin a little before seven o'clock. The night shift was at work in the mine while the day fire boss was making his inspection, and shots were fired by the night shift in many

places after the day fire boss had passed, and there was no further inspection of those places by any person between the firing of the last shot by the night shift at about five o'clock in the morning and the going to work of the day shift at about seven o'clock.

The fire bosses both testified that they had more work than they could properly attend to, and that the day foreman within a few days before the explosion had promised each of them an assistant to help hang canvass, but did not supply an assistant to either as promised. *(Trans. pp. 34, 144.)*

On Sunday night before the explosion the excavation of coal in room 8 of the fourth left entry was finished, but the track in the room had not been removed at the time of the explosion. On that Sunday night Kilpatrick, the night foreman, found two men working in that room with a safety-lamp. He took the lamp and tried the room for gas and found enough to fill the safety lamp and explode in it. He did not return to the room until after the explosion. *(Trans. 122-3.)*

He had no further duty with reference to the room without special orders from Donahoe. *(Trans. 125-6.)*

On Monday morning, before the explosion on Wednesday, Deighton, the day fire boss, found a body of gas in room 8 of the fourth left entry, and put a danger mark on a tie above the last cross-cut in the room. *(Trans. p. 132.)*

He did not go back there before the explosion, although room 8 was one of the worst rooms for gas, and he knew it was his duty to go back and remove the gas. *(Trans. p. 143.)*

He reported the gas to the foreman Donahoe. *(Trans. p. 147.)*

On Monday night before the explosion, Ray, the night fire boss, was at the face of room 8 in the

fourth left entry. He found no fire-mark or danger signal such as Deighton says he placed there on Sunday night, but he did find a body of gas extending back ten or eleven feet from the face of the room and he put fire marks in the room, one above the cross-cut in room eight and one below the cross-cut on the right. *(Trans. p. 36.)*

He did not visit the fire-mark in room 8 between Monday night and the explosion and did not remove the gas because there was nobody working there and he was crowed with his work. He told Donahoe that there was a little more gas than usual in room 8 Monday night. *(Trans. p. 37.)*

The fire boss, Ray, testified that it was his duty, after he discovered the gas in room 8, to carry the brattice near enough up to the face to cause air to carry the gas out, but he never had time to do it; that he marked room 8 because he knew that the air would not carry the gas out without a change of the brattice; that when he reported the gas to Donahoe he and everybody else relied upon the fact that Donahoe would not send anybody into that room with a naked light until after the gas was removed; that the way that mine was run he was not compelled to go back to room 8 after he put the fire-mark there; that when he discovered the gas and put the fire-mark, he had not exactly done his duty but had done it as far as he could. *(Trans. p. 70.)*

The fire boss, Deighton, testified as follows:

Q. Would it have been your duty to go back and look at it? (The fire mark).
A. Yes.
Q. When?
A. Any time.
Q. Wasn't it your duty to go back the next day, and don't you know it was?
A. Well, it was an abandoned room and

I had the necessary mark up there.

Q. Answer the question. Don't you know that it was your duty to go back to that fire-mark the next day?

A. Yes, sir.

Q. And every day until that gas was removed?

A. Yes, sir.

Q. And don't you know it was your duty to remove that gas?

A. If I could.

Q. You could, couldn't you?

A. No sir.

Q. No appliances in that mine whereby you could have removed that gas from there?

A. No, sir; I don't know if there was.

Q. As you understand your duty in that mine you had no right to remove that gas until somebody authorized you to do it?

A. No, I meant that I could not get it out, it was so far away from the cross-cut and I had no authority to put in a cross-cut through to No. 9 room and drive it out of 8.

(Transcript, p. 144.)

After the explosion, the bodies of Donahoe, mine foreman, and Flick and Kelly, two company men, were found in room No. 8. Kelly's body was at the corner of the last cross-cut and the body of Flick opposite the cross-cut. *(Trans. page 140).* Donahoe's body was about five feet from the body of Kelly. *(Trans. p. 243).* All three had the ordinary miners' lamps in their caps. The tools used by them in taking up track were in the room.

From these circumstances the inference is irresistible that Flick and Kelly went with Donahoe, under whose direction they worked, into room 8 with naked lights, and that the explosion was caused by the gas in the room coming in contact with one of those lights.

Deighton was one of the first to go into room 8 after the explosion and he found no fire mark there. *(Trans. p. 140).*

Fletcher did find a tie with a danger mark on it fifty or sixty feet above the cross-cut toward the face of the room. *(Trans. page 74).*

Fire marks or danger signals consisted of a cross or two crosses and the date and initials of the fire boss written with white chalk upon a tie or a shovel thrown down on the track.

It will be observed that while the fire boss, Ray, went into room 8 after Deighton had been there and had put his mark in the room, he failed to see the mark which Deighton says he put there, and also that Deighton, after the explosion, failed to find the mark which Ray says he put there on Monday night before the explosion, while Fletcher found such a mark in the room on the day when he went down with the coroner's jury, but the place where Fletcher says he saw the danger mark was fifty or sixty feet above the cross-cut, and therefore at least fifty feet further up the room than where either body was found, which shows that the gas had crossed the fire mark and had come down the room so far that it was ignited before the men had any chance to see the mark.

Kilpatrick found a tie with a fire mark on it almost in front of and a little below the cross-cut when he went into the room after the explosion. It had the initials W. R. and the date. *(Trans. p. 115.)*

Kilpatrick only went as far as the top cross-cut of room eight on this occasion. *(Trans. p. 114.)*

He went from the neck of the room on the main entry straight up the room and did not go through the cross-cut at all. *(Trans. p. 126-7.)*

The tie which Kilpatrick found below the cross-cut is undoubtedly the tie which Ray says he placed below the cross-cut on Monday night before the explosion. *(Trans. p. 63.)*

The evidence conclusively establishes that the explosion was caused by the ignition of gas in room 8 of the fourth left entry of the mine. The theory of a powder explosion is wholly unsupportable. There was no sound such as would have been produced by an explosion of powder. The same is true of the theory of an explosion caused by a gunning shot. No witness testified to having heard a report such as would be caused by a gunning shot, and witness Beck testifies that he had heard the shots at nine o'clock on the morning of the explosion and that he heard no other after the nine o'clock firing; that if there had been any shot fired in the fourth left entry, or in any of those rooms, he would have heard it, and that there was not at the time of the explosion any noise or report such as accompanies the explosion of gunpowder. *(Trans. p. 48.)*

There were some powder cans found which had evidently been rent open by explosion, but there were unexploded powder cans and a cartridge made up ready to be used which were not exploded.

Miners' dinner-buckets, coats and mine boxes were, in some places, undisturbed, while in one of the rooms a drilling machine was still in an upright position, and that was in a room adjoining the one in which, according to the testimony of Fletcher, the greatest evidences of violence were found.

After the accident everything pointed to a gas explosion originating in room 8. All witnesses, on both sides, agreed that a gas explosion always travels against the air; that is, that it expends its force in the direction from which the air is coming.

There is no evidence of explosion in the mine ~~above~~ below the fourth left air-course nor above or beyond room 8 in the fourth left entry. There was no evidence of flame within fifteen feet of the face of room 8, and there was evidence of flame in the other direction all the way around, through all the rooms and entry, to the water in the fourth left air-course. This is a demonstration of two things: First, that the explosion started in room 8, and, second, that the air was not going to the face of room 8.

A boy whose business it was to open and close the door going from the main slope into the fourth left entry, was blown through the door and out toward the ~~slope a distance~~ of not less than seventy feet. There is no theory upon which the injury to this boy can be explained under the evidence, except that the force of the explosion came in contact with the body of water in the fourfh left air-course, which body of water was sufficient to stop it and cause it to rebound, and the force of the explosion on the rebound, of course, found escape at the point of least resistance, to-wit, the door.

We assert that there is no conflict between the witnesses as to the following facts:

I.

There was a body of water in the fourth left air-course of the mine which lay along the air-course from two hundred to three hundred feet and extended certainly to within three inches of the top on the low side.

II.

This body of water was known to exist by Donahoe and both fire bosses. Its existence was not known to plaintiff's intestates and the other coal miners working in the mine.

III.

This body of water was allowed to accumulate in that particular place in the mine because the appliances were not sufficient to take out all the coal produced and to keep the mine free from water.

IV.

On Sunday night, before the explosion on Wednesday, the night foreman, Kilpatrick, discovered gas in room 8 of the fourth left entry and made no effort to get it out, nor did he return to the room before the explosion.

V.

On Monday morning, before the explosion on Wednesday, the day fire boss found a body of gas in room 8 of the fourth left entry and markod the room with a danger mark on a tie above the last cross-cut in the room, and did not return to the room until after the explosion.

VI.

On Monday night, before the explosion on Wednesday, the night fire boss discovered a dangerous body of gas in room 8 of the fourth left entry, but did not see the danger mark placed there by the day fire boss. This gas then extended entirely across the face of the room and down ten or eleven feet from the face. He put fire marks in the room, one above, and one below, the last cross-cut, and did not return to the room untii after the explosion, although he knew it was his duty to return and remove the gas.

VII.

Fletcher, the mine inspector, *(Trans. 85-6)*, and Duggan, the superintendent, *(Trans. 192-4-5)*, both testified that the

water in the air-course and the gas in room 8 should have been removed.

It is something more than a coincidence that, within two months before the explosion, the foremen and fire bosses in the mine were changed, and that four men were employed for these positions, no one of whom had ever filled a similar position.

Donahoe was appointed day foreman less thon two months before the explosion. *(Trans. p. 177)*. He had never been foreman in a mine before his appointment. *(Trans. p. 200)*.

Kilpatrick was appointed night foreman six or seven weeks before the explosion. *(Trans. p. 104)*. He had never been foreman in a mine before. *(Trans. p. 90)*.

Deighton was employed as fire boss about January 1st, 1895. *(Trans. p. 131)*. He had never been fire boss in a mine before. *(Trans. pp. 142-3)*.

Ray was employed as fire boss about January 1st, 1895. *(Trans. p. 35)*. He had been assistant fire boss in the Indian Territory for five or six months once, but had never been fire boss in a mine until he was appointed to that position in the White Ash Mine.

Duggan had been superintendent of the White Ash Mine about one year and nine months at the time of the explosion. *(Trans. p. 169)*. At the time of his appointment he had been underground in coal mines only as much as six or eight hours in his life. He had not been under ground in a coal mine for seven or eight years. He had never been a mine superintendent, and was practically without experience in any kind of mining, except that he was familiar with mining machinery and understood operating a diamond drill. *(Trans. p. 189)*.

The employes of the defendant in error signed a book which was kept in the Company's office and was

known as the contract, *(Trans. p. 210)*, in which it is set out:—

> " * * * In order that there may be a full and complete understanding between the company and its employes, the following rules and regulations are hereby agreed to, and adopted by the company, for the government of its mines. Its superintendent and other officers are hereby commanded to enforce them in such a manner as to secure equal justice to all concerned."

Among the rules are the following:

> "No. 3. No person or persons whether employed by the company or not, will be permitted to dictate who shall be employed or discharged or to interfere in any way or manner in such matters. The company has secured the services of experienced mining superintendents, who will deal justly with men employed, who will give gentlemanly treatment to all, and expect the same in return." *(Trans. page 211.)*
>
> "No. 17. All employes are requested to report any unsafe place to the mine boss who shall at once have the same repaired and permit no one to enter therein until it is put in proper condition. Reckless persons, or those having no knowledge of mining, will not be permitted in the mine. The mine boss will personally examine the mine and know all parts thereof are in safe condition." *(Trans. p. 213.)*

An act of Congress in force at the time of this explosion contains the following:

> "Sec. 6. That the owners or managers of every coal mine at a depth of one hundred feet or more shall provide an adequate amount of ventilation of not less than fifty-five cubic feet of pure air per second or thirty-three hundred cubic feet per minute for every fifty men at work in said mine, and in like proportion for a greater number,

> which air shall by proper appliances or machinery be forced through such mine to the face of each and every working place, so as to dilute and render harmless and expel therefrom the noxious or poisonous gases; and all workings shall be kept clear of standing gas." *(1st Supp. Rev. Statutes, 948).*

At the trial the mine inspector, Fletcher, was permitted over objection, to answer certain questions which are made the subject of the first five assignments of error. The court also refused to permit counsel for plaintiff in error to ask certain questions of the witnesses, Kilpatrick and Duggan, and these are made the subject of the 6th, 8th, 9th and 10th assignments of error. Duggan was permitted, over objection, to testify as to the kinds of stoppings customarily used in coal mines, and this is made the subject of the 7th assignment of error.

This case has been twice reviewed by the supreme court of the Territory of New Mexico. On the first occasion that court distinctly held that the fire bosses in the discharge of their duties, inspecting the mine for gas, represented the Company and that the Company was chargeable for their neglect. The case was reversed, however, upon the theory that there was evidence from which the jury might have inferred that the intestates of plaintiff in error assumed the risk of standing gas in the mine. The court said:

> "The rule adopted in The White Ash mine, of the fire boss making rounds of inspection, and advising miners as they went to work, of the condition of their places as to safety, and the fact that all employes well understood that danger signals were used in the mine to prevent entrance into particular places of rooms, pre-supposed that deceased

> and his co-employes knew that work was and might be carried on without cessation, though there might be standing gas in places or rooms of the mine, and that they understood, when informed that their working-places were safe, that such representation did not mean there was no standing gas in the mine, or in any particular entry of the mine." *(49 Pac. 808.)*

The doctrine thus laid down had not been contended for by the counsel for the company upon the trial or in the supreme court in argument or in their brief.

On the second trial, however, plaintiff in error proved affirmatively by the witnesses, Ray, *(Trans. 26,)* Beck, *(Trans. 47,)* Hunt, *(Trans. 157,)* and McKinley, *(Trans. 166,)* that the miners working in the fourth left entry had no knowledge or means of knowledge that the fourth left air-course was obstructed by water, and also by the same witnesses that there was no rule or custom known to the miners whereby a dangerous quantity of explosive gas was permitted to accumulate in the mine and remain as long as thirty-six or forty-eight hours protected only by a fire mark.

Plaintiff in error also proved affirmatively by the fire bosses, Ray and Deighton, that none of the coal diggers who were killed in the explosion had any knowledge or means of knowledge of the fire marks in room 8 of the fourth left entry nor any business to make any inquiry in regard thereto and that the miners relied on the fire bosses for their safety and had no knowledge or means of knowledge as to how the fire bosses discharged their duties.

Upon the second review, the learned court, affirming the judgment of the court below, held that the trial judge should have sustained the motion of the

defendant in error and should have instructed the jury to find the defendant not guilty.

We are not able from the opinion to determine by just what process of reasoning this result is reached, but we do know from numerous decisions of this court that the conclusion of the supreme court of the territory is unwarranted, unless all of the evidence in the case with all of the inferences which the jury could properly draw from that evidence, would not support a verdict in favor of the plaintiff in error.

At the close of all the evidence each side moved the court to direct a verdict in its favor but the court overruled both motions and sent the case to the jury. After the verdict there was a motion for a new trial upon the ground, among others, that the verdict was against the weight of the evidence, and the trial judge, in overruling the motion, ordered it to be certified upon the record that the motion was overruled upon the ground that there was a conflict of evidence in the cases, and the court was of opinion that it had, in such a case, no discretion to set aside the verdict as against the weight of the evidence. *(Trans. p. 30).*

The state of this record has rendered it necessary, in the opinion of counsel, to specify twenty-nine grounds of error. They are as follows:

I.

The district court erred in overruling the objection of plaintiff in error to the question: "Then, if this explosion occurred at 10:45, state whether or not—state what at that particular time the miners in the room would be engaged in," *(page 72 of transcript)*; and the supreme court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

II.

The district court erred in permitting the witness Fletcher to testify, over objection of plaintiff in error,

that he had seen flame from a gunning shot extend seventy feet in the third right entry of the White Ash Mine, *(Trans. page 72)*; and the supreme court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

III.

The district court erred in permitting the witness Fletcher to answer the question: "What effect, if any, would such a condition have upon any small quantities of gas, either passing in any portion of the mine or in any portion of the fourth left entry, which, under ordinary conditions, would in no way be dangerous in the operation of ihe mine?" *(Trans. page 73)*; and the supreme court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

IV.

The district court erred in permitting the witness Fletcher to answer the question: "From your experience as a miner and your connection with mines which generate gas, what have you to say with reference to the possibilities of a sudden and unlooked-for appearance of gas at any place in the White Ash Mine?" *(Trans. page 80)*; and the supreme court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

V.

The district court erred in permitting the witness Fletcher to answer the question: "I will ask you what any two men going into room 8 and finding the brattice in that room down would have done if they had seen a danger signal lying across the track in that room?" *(Trans. page 95)*; and the supreme court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

VI.

The district court erred in refusing to permit the witness Kilpatrick to answer the question, "Was there any means provided for removing water from

the fourth left air course prior to the explosion?" *(Trans. page 121)*; and the supreme court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

VII.

The district court erred in permitting the witness, Duggan, to answer the question, "With reference to the operation of coal mines of the character of the White Ash, I will ask you now whether or not you are able to state whether the stoppings in the various cross-cuts were or were not of the kind accustomed to be used in mines of that character for the purpose of carrying air around to the face of the working places," *(Trans. p. 185)*, and the supreme court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

VIII.

The district court erred in refusing to permit the witness, Duggan, to answer the question, "If such an opening were made by the fire boss under the direction of the mine foreman, should it have been reported to you?" *(Trans. p. 199)*; and the supreme court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

IX.

The district court erred in refusing to permit the witness, Duggan, to answer the question, "Unless that had been done it would have been impossible to go into the mine, would it not, Mr. Duggan?" *(Trans. page 201)*; and the supreme court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

X.

The district court erred in refusing to permit the witness, Duggan, to answer the question, "And the fact of the business is, Mr. Duggan, that you don't know anything about this, and that you are trying to speculate, theorize upon some theory that would re-

sult in releasing the defendant company from liability, is that not so?" *(Trans. page 206)*; and the supreme court or New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XI.

The district court erred in refusing to instruct the jury at the close of the evidence that the defendant was guilty of negligence, and the supreme court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous. *(Trans. 251.)*

XII.

The district court erred in refusing to take the case from the jury and find the facts when both parties asked for peremptory instructions, and the supreme court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XIII.

The district court erred in submitting to the jury anything except the question of damages, and the supreme court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XIV.

The district court erred in giving instruction number 1 asked by the defendant as follows: "The jury are instructed that what was required of the defendant in the conduct of its mining business, in caring for the miners employed by and engaged in working its mine, was the adoption and use of appliances and methods reasonably sufficient for the protection of the miners against any dangers attending the operation of its mine that were obvious or might with reasonable diligence have become known, and in the absence of evidence to the contrary it is presumed that the defendant performed its entire duty towards the miners in that respect," *(Trans. p. 257)*; and the

supreme court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XV.

The district court erred in giving instruction No. 6 asked by the defendant, as follows, to-wit: "Although the jury may believe from the evidence that gas of the quantity mentioned in the evidence had accumulated and was allowed to remain in room 8 for the time stated in the evidence, and believe from the evidence that the explosion testified to originated in room 8, and further believe from the evidence that signals of the kind described in the evidence warning against entry into said room were placed in such manner as to be observed by the deceased Flick and Kelly, and the meaning and significance of such signal was understood by them, and such signal was known to be in use by the miners engaged in working in said mine, and that the use of such signal was understood by such miners to inform them of the presence of gas in dangerous quantity, then if the jury believe from the evidence that such explosion was caused by Flick and Kelly entering said room with a naked light, the defendant is entitled to and you should render a verdict in its favor," *(Trans. page 258)*; and the supreme court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XVI.

The district court erred in giving instruction No. 10 asked by the defendant as follows, to-wit: "The burden of showing negligence on the part of the defendant that caused the death of the persons for which this action is brought, is upon the plaintiff, and evidence has been introduced for the purpose of showing an obstruction of the air-course through which that portion of the mine was ventilated. The presumption is that the mine was properly and sufficiently supplied with air, unless the evidence offered establishes the contrary, and to do this the jury must find not only a partial obstruction of the air-course,

but that the obstruction was of such a nature and to such an extent as to prevent the passage of the necessary quantity of air, and if upon the whole testimony the jury believe that, notwithstanding the partial obstruction, there still was space enough in the air-course unobstructed to allow the proper and sufficient ventilation of the mine and of the fourth left entry where such deceased persons were at work, you will find a verdict for the defendant, unless you find from the evidence that the negligence of the defendant in some other way caused or contributed to the death of such persons," *(Trans. page 258)*; and the supreme court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XVII.

The district court erred in giving instruction No. 11 asked by the defendant as follows, to-wit: "If the jury shall believe from the evidence that the defendant permitted fire gas to accumulate in room eight of its mine, and that such gas would not produce any injury until ignited, and that it was ignited by Flick and Kelly, or either of them, by going into said room with a naked light (contrary to the rules and orders of the defendant), and by such naked light the fire gas was ignited and exploded, causing the death of plaintiff's intestates, such explosion and injury were directly and immediately caused by the act of the fellow servants of plaintiff's intestates, and not by the negligence of defendant, and defendant is not liable therefor, and a verdict should be rendered for the defendant," *(Trans. pages 258-59)*, and the supreme court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XVIII.

The district court erred in failing to instruct the jury that if Flick and Kelly went into room eight in company with or under the direction of the mine foreman, Donahoe, without any knowledge of the existence in said room of a dangerous body of gas at

the time of going in, and that at the time of the explosion Flick and Kelly were using due care to avoid accident, the defendant was liable, notwithstanding the explosion may have been directly occasioned by the act of Flick and Kelly *(Trans. page 260)*; and the supreme court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XIX.

The district court erred in its charge to the jury by ignoring the fact that there was evidence tending to show that Donahoe's body was found in room eight in close proximity to the bodies of Flick and Kelly, and also the fact that from this evidence the jury had a right to infer that Donahoe ignited the gas, and the supreme court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XX.

The district court erred in overruling the motions for new trials and the supreme court of New Mexico erred in refusing and failing to consider such action of the district court as erroneous.

XXI.

The supreme court of New Mexico erred in affirming the judgment of the district court.

XXII.

The supreme court of New Mexico erred in its statement in its opinion that the theory of the prosecution as to the cause of the explosion was that owing to an accumulation of water in a low place in the fourth left air-course a sufficient quantity of pure air was not going to the face of the workings in the fourth left entry to remove and expel the obnoxious gases, and that Kelly and Flick with naked lights set fire to the gas which had accumulated by reason of the insufficiency of air.

XXIII.

The supreme court of New Mexico erred in its statement that, from the measurements taken at vari-

ous times, sufficient air was going through the mine, as the measurements were all taken at times long before the explosion and showed a diminishing supply of air.

XXIV.

The supreme court of New Mexico erred in its opinion where it states that at the time of the investigation by the coroner's jury a sufficiency of air was passing through the fourth left air course, as that fact was immaterial, and the evidence showed that at the time the mine was idle and a large part of the water had been removed after the explosion.

XXV.

The supreme court of New Mexico erred in its opinion where it states that there is no evidence that the condition of the fourth left air course was the proximate cause of the explosion.

XXVI.

The supreme court of New Mexico erred in its opinion where it holds that for plaintiff to recover it must be proved that the condition of the fourth left air course was the proximate cause of the explosion.

XXVII.

The supreme court of New Mexico erred in its opinion where it states that plaintiff's contention was that the explosion was caused by Kelly and Flick, by the order of Donahue, or by all three, going into room number 8 with a naked light over the danger signal.

XXVIII.

The supreme court of New Mexico erred in its opinion where it declared that if the explosion was caused by Kelly and Flick, by the order of Donahoe, going into room number 8 with a naked light and igniting the gas, the accident was the result of the negligence of a fellow servant, and therefore plaintiff could not recover.

XXIX.

The supreme court of New Mexico erred in its opinion where it holds that the district court should have instructed the jury to find the defendant not guilty.

POINTS AND AUTHORITIES.

I.

The rulings of the Trial Court upon the question of evidence, which are made the subject of the first ten assignments of error, were erroneous.

It is difficult to understand the theory upon which these rulings were made. The first one allowed the witness, Fletcher, who was in Topeka, Kansas, at the time of the explosion, to testify to his speculations as to what the men in the mine were doing at the time of the accident. He showed no special knowledge on this subject and there was no effort made by the defendant in error to show from the positions of the bodies of the dead men or from other circumstances found in the mine after the explosion, how the men were actually engaged when they met their death. The question called upon the witness to speculate and in answer to it he indulged in the merest guess, which was allowed to go to the jury. *(Trans. p. 72).*

The second ruling complained of permitting the same witness to testify with reference to a gunning shot and its effect in the third right entry of the mine at some time prior to the explosion. There was absolutely no evidence in the case from which the jury might have inferred that a gunning shot

caused this explosion and the effect of this evidence must have been, as the intention clearly was, to withdraw the attention of the jury from the real issue which they were called upon to try. *(Trans. p. 72).*

The third ruling complained of permitted the same witness to testify to a theory, unsupported by any evidence, which involved the assumption that there were small quantities of gas in the mine which, under ordinary conditions, would in no way be dangerous. *(Trans. p. 73).*

The fourth ruling complained of permitted the same witness to testify that "Men drilling holes may tap gas or a certain break in the roof where gas is given off from the adjoining strata, gas is liable to appear," when there was no evidence from which the jury might infer that, at the time of this explosion, any man in the fourth left entry was engaged in drilling a hole nor was there any evidence of any break in the roof, but on the contrary the uncontradicted evidence in the case was that the fourth left entry was not liable to produce gas unexpectedly. *(Trans. page 148).* The question called upon the witness to speculate and the answer was purely speculative. *(Trans. p. 80).*

The fifth ruling at pages 95-6 of the transcript, called for more speculation on the part of the same witness, and an examination of the entire evidence of this witness will show that counsel for defendant in error was permitted to lead him and suggest to him and invite him to speculate as to the cause of this explosion, and that he never hesitated to advance the most preposterous theories whenever by so doing there appeared to be an opportunity to confuse the jury.

The sixth ruling complained of was clearly prejudicial to the plaintiff in error. The witness Kilpatrick had been permitted to testify upon his examination in

chief that every part of the mine was in good condition *(Transcript p. 111)*, and when asked upon cross examination, "Was there any means provided for removing the water from the fourth left air-course prior to the explosion?" the objection was made "That the question was improper cross-examination, nothing having been gone into with reference to the means of removing water from any part of the mine with this witness," and the court sustained the objection. *(Trans. p. 121.)* This cut plaintiff in error off from showing by this witness, that his testimony that the mine was in good condition prior to the explosion, was not true, and we certainly had the right to prove by him the existence of this fact, if it was a fact. That we were permitted to prove it by other witnesses does not cure the error because it is manifest that the sustaining of this objection, by the court, at the time it was sustained, closed the door to further cross-examination of this witness on that line.

The seventh ruling complained of relates to the testimony of the witness Duggan, who was allowed over objection to answer that the stoppings used in the White Ash mine are similar to those used in other mines when he had not shown that he had ever been in any other coal mine. *(Trans. p. 185.)* The cross-examination of this witness demonstrates the impropriety of this question because the witness shows upon cross-examination affirmatively that he had had no such experience as qualified him to express an opinion on the point involved in the question.

Upon the cross-examination of this witness the court refused to permit us to show that it was the duty of the fire-boss or of the mine foreman to report to him the fact that a certain opening had been made in one of the stoppings of the mine to let air into the

men working on the fourth left plane. It was and is the theory of plaintiff in error that the fact that such an opening had to be made was evidence of a serious obstruction in the air-course. We had proved by the witness who made the opening that it had been made under the direction of the mine foreman and we sought by this question to prove that it was a breach of duty on the part of the mine foreman or the fire-boss not to report this opening to the superintendent. We were not allowed to do so. The ground of objection which was sustained by the court as found in the record is "objected to as improper cross-examination and as being a hypothetical question based upon facts not testified to by the witness or anybody else." *(Trans. p. 199-200.)* The witness on his direct examination had testified as to the duties of the mine foreman and fire-bosses at length. On cross-examination he was asked as to this particular duty and it was proper cross-examination. It was not a hypothetical question because the witnesses Kilpatrick and Deighton both testified to such an opening having been made for the purpose indicated and this fact was not disputed. *(Trans. page 117, Trans. page 145.)*

The next ruling complained of was the refusal of the court to permit us to ask the witness Duggan the question (referring to the running of the engine night and day between the time of the explosion and investigation by the coroner's jury). "Unless that had been done it would have been impossible to go into the mine, would it not?" "Objected to as calling for an opinion of the witness and the facts speak for themselves." *(Trans. p. 201.)*

It seems to us that this was not calling for the opinion of the witness but was asking him to describe the conditions existing there.

The next and last ruling on the evidence complained of was the refusal of the court to permit us to show by the witness Duggan that he was trying to speculate and hit upon some theory which would relieve the defendant in error from liability for this explosion. It was a question which went directly to the credibility of the witness and which, if answered in the affirmative, as the truth probably required, would have justified the jury in disregarding his testimony. No ground is stated for this objection and we are left to conjecture as to the theory upon which the question was ruled out. *(Trans. p. 206.)*

The court will discover that in asking for a review of the action of the trial court, as to these rulings on evidence, we have chosen but few of the many instances in which exceptions were taken at the trial. We have made this selection with great care and confidently believe that in each one of the ten rulings complained of the trial court violated elementary rules of evidence.

New England Glass Co. vs. Lovell et al., 61 Mass. 320.
State vs. Watson, 65 Maine, 74.
State vs. Pike, 65 Maine, 115.
Elkhart Co. vs. Waldorf, 46 N. E. 88.
Railway Co. vs. Kellogg, 94 U. S. 473.
Conn. Insurance Co. vs. Lathrop, 111 U. S. 618.
Camel vs. Richards, 5 Barn. & Adolph., 840.
White vs. Balue, 90 Mass. 408.
Higgins vs. Dewey, 107 Mass. 494.

II.

There was no conflict in the evidence and the Court should have found the facts and directed a verdict in favor of plaintiff in error, submitting to the jury only the question of damages.

At the close of the evidence each party asked the court to direct a verdict. This amounted to an assertion on the part of each party, that there was no disputed question of fact for submission to the jury, and nothing in the case to deflect the legal questions arising upon the evidence. Under such circumstances the court should have directed the jury that the defendant in error was guilty of negligence, as matter of law, and should have submitted to the jury only the question of damages.

While it is usually stated that the existence or non-existence of negligence is a question of fact to be determined by the jury, courts universally, in proper cases, direct verdicts in favor of defendants upon the ground that the evidence fails to sustain the allegations of negligence. This could only be done upon the theory that the absence of negligence, in a given case, was to be determined as a question of law. Is it not equally true that the existence of negligence in a proper case may be determined as matter of lay by the court?

Beuttell vs. Magone, 157 U. S. 154.
Christie vs. Foster, 61 Fed. 551.
Merwin vs. Magone, 70 Fed. 776.
Gunther vs. Amsden, 44 N. Y. S. 982.
Mascott vs. First National Fire Ins. Co., 37 Atlantic 255.
Clason vs. Baldwin, 46 N. E. 322.
Elliot vs. Chicago, etc., R. R. Co., 150 U. S. 245.
Gardner vs. Mich. Con. R. R. Co., 150 U. S. 349.
Delaware, etc., R. R. Co., vs. Converse, 139 U. S. 469.
Roberson vs. Edelhoff, 132 U. S. 615.
North Penn. R. R. Co. vs. Comm. Bank, 123 U. S. 727.

III.

Instruction Number One given at the request of counsel for defendant in error does not correctly state the full measure of its duty to its employes.

The jury are told in this instruction that what was required of defendant in the conduct of its mining business in caring for the miners employed by and engaged in working its mine was:

"The adoption and use of appliances and methods reasonably sufficient for the protection of the miners against any dangers attending the operation of its mine that were obvious or might with reasonable diligence have become known."

Paragraph ten of the court's charge sets forth the defendants duty in language certainly as favorable as it could claim, but this instruction necessarily neutralizes that part of the charge and is in conflict with it.

The fourth left air course as originally constructed was confessedly sufficient, if properly inspected, and kept free from obstruction. Yet, under this instruction, the obstruction of the air course by water, subsequent to its adoption, would furnish no ground for recovery. The instruction ignores the duty of inspection which rested upon defendant and in effect told the jury that if the mine of defendant was originally properly ventilated and the methods adopted by it originally were sufficient, defects subsequently arising would create no liability.

The statute required the defendant to keep its mine free from standing gas, but this instruction utterly ignores the existence of the statutory duty, and taken in connection with the other instructions given at the request of defendant, licensed the jury to substitute ~~to submit~~ its judgment for that of Congress and to decide that it would not be negligence on the part of the defendant to permit any quantity of standing

gas to accumulate in the mine provided it was marked with a fire-mark.

Sommer vs. Coal Co., 89 Fed. Rep., 56-7.

It is true that in the court's charge to the jury the duty of inspection and of keeping the mine free from standing gas was called to the attention of the jury, but if these were the "appliances and methods" to which this instruction refers, it should have been refused as being already covered by the charge of the court. It could have been asked for and given upon no other theory than that it was intended to limit and qualify what had already been said to the jury. There is no aspect of the case upon which this and the other instructions given at the request of defendant, can be defended. They are all in direct and irreconcilable conflict with the court's charge, and this particular instruction, whether it be taken as an explanation of what was said in the charge on the subject of the master's duty to the servant, or as laying down independently a rule for the guidance of the jury, was calculated to mislead the jury, because it does not state a correct rule by which to measure the master's duty to the servant. There can be no doubt that the master here owed to the deceased the positive duty to make reasonable efforts to supply a safe mine with proper appliances for ventilation, etc., in which to do the work of the master, and to make like efforts to keep the mine and the ventilating appliances in a safe condition. In order to discharge this duty it was certainly incumbent on the master to make proper inspection of these ventilating appliances, and to keep them in good order, but this is omitted from this instruction.

> A railroad corporation may be controlled by competent, watchful and prudent directors, who exercise the greatest caution in

the selection of a superintendent or general manager under whose supervision and orders its affairs and business in all of its departments, are conducted. The latter in turn may observe the same caution in the appointments of subordinates at the head of the several branches or departments of the company's service. *But the obligation still remains to provide and maintain in suitable condition the machinery and apparatvs to be used by its employes*, an obligation the more important and the degree of diligence in its performance the greater, in proportion to the dangers which may be encountered. Those, at least, in the organization of the corporation, who are invested with controlling or superior authority in that regard represent its legal personality; their negligence from which injury results is the negligence of the corporation. The latter can not, in respect to such matters, interpose between it and the servant who has been injured, without fault on his part, the personal responsibility of an agent, who, in exercising the master's authority, has violated the duty he owes, as well to the servant as to the corporation.

Hough vs. Railway Co., 100 U. S. 218.

According to the authorities cited there can be no question as to the liability of the railroad company to the plaintiff for the injuries he sustained. If no one was appointed by the company to look after the condition of the cars, and see that the machinery and appliances used to move and to stop them, were kept in repair and good working order, its liability for the injuries would not be the subject of contention. Its negligence in that case would have been in the highest degree culpable. If, however, one was appointed by it chhrged with that duty, and the injuries resulted from his negligence in its per-

formance, the company is liable. He was, so far as that duty is concerned, the representative of the company; his negligence was its negligence and imposed a liability upon it, unless, as contended, it was relieved therefrom by the statute of Dakota.

Northern Pacific R. R. Co. vs. Herbert, 116 N. S. 652.

All occupations producing articles or works of necessity, utility or convenience may undoubtedly be carried on, and competent persons, familiar with the business and having sufficient skill therein, may properly be employed upon them, but in such cases where the occupation is attended with danger to the life, body or limb, it is incumbent on the promoters thereof and the employers of others thereon to take all reasonable and needed precautions to secure safety to the persons engaged in their prosecution, and for any negligence in this respect, from which injury follows to the persons engaged, the promoters, or the employers, may be held responsible and mulcted to the extent of the injury inflicted. The explosive nature of the materials used in this case, and the constant danger of their explosion from heat or collision, as already explained, was well known to the employers and was a continuing admonition to them to take every precaution to guard against explosions. Occupations, however, important, which cannot be conducted without necessary danger to life, body and limb, should not be prosecuted at all without all reasonable precautions against such dangers afforded by science. The necessary danger attending them should operate as a prohibition to their pursuit without such safeguards. Indeed, we think it may be laid down as a legal principle that in all occupations which are attended with great and unusual danger

there must be used all appliances readily attainable known to science for the prevention of accidents, and that the neglect to provide such readily attainable appliances will be regarded as proof of culpable negligence. If an occupation atttended with danger can be prosecuted by proper precautions without fatal results, such precautions must be taken by the promoters of the pursuit or employers of laborers thereon. Liability for injuries following a disregard of such precautions will otherwise be incurred, and this fact should not be lost sight of. *So, too, if persons engaged in dangerous occupations are not informed of the aecompanying dangers by the promoters thereof, or by the employers of laborers thereon, and such laborers remain in ignorance of the dangers and suffer in consequence,* the employers will also be chargeable for the injuries sustained. Both of these positions should be borne constantly in mind by those who engage laborers or agents in dangerous ocupations, and by the laborers themselves as reminders of the duty owing to them. These two conditions of liability of parties employing laborers in hazardous occupations are of the highest importance, and should be in all cases strictly enforced.

Mather vs. Rillston, 156 U. S. 398-9.
Western, etc., Co. vs. Ingraham, 70 Fed. R. 219.
Western C. & M. Co. vs. Berberich, 94 Fed. R. 333.
Cowen vs. Rush, 76 Fed. R. 349.
Texas & P. R. R. vs. Barrett, 166 U. S. 617.

IV.

Instruction No. 6 given at the request of counsel for defendant in error is erroneous.

The instruction complained of is as follows:

> Although the jury may believe from the evidence that gas of the quantity mentioned in the evidence had accumulated and was allowed to remain in room 8 for the time stated in the evidence, and believe from the evidence that the explosion testified to originated in room 8, and further believe from the evidence that signals of the kind described in the evidence warning against entry into said room were placed in such manner as to be observed by the deceased Flick and Kelly, and the meaning and significance of such signal was understood by them and such signal was known to be in use by the miners to inform them of the presence of gas in dangerous quantity, then if the jury believe from the evidence that such explosion was ceused by Flick and Kelly entering said room with a naked light, the defendant is entitled to and you should render a verdict in its favor.

This instruction was evidently intended to give to the jury some rule of law, with reference to the risk assumed by the plaintiff's intestates. As such it is so inaccurate that it might be characterized as laying down a barbarous rule. If danger signals were in use in the mine, if they were used to warn the miners of dangerous bodies of gas, if they were placed so as to be observed by Flick and Kelly, and Flick and Kelly entered the room with a naked light, the defendant is not liable. The court, in effect, says:

It does not matter that the air-course had been without the knowledge of deceased obstructed by water for a month; it does not matter that the defendant was guilty of criminal negligence, of which deceased had no knowledge, in failing to remove the gas in room 8 for 48 hours before the explosion; it

does not matter that Donahoe, the mine foreman went into the room with Flick and Kelly; it does not matter that there is no evidence from which the jury could properly infer that either Flick or Kelly crossed over a danger signal; all of these circumstances are of no consequence; Flick and Kelly were fellow servants of the deceased; they were guilty of negligence, and therefore the defendant is absolved from liability for its negligence, however gross.

We contend taat the evidence shows affirmatively that neither Flick nor Kelly saw the danger signal; that the evidence shows affirmatively that the signals placed by the fire bosses, Ray and Deighton, were placed at points never reached by Flick and Kelly on the morning of the explosion; but we also contend, even if the contrary of this were established, even if the evidence showed that Flick and Kelly crossed the fire mark and ignited the gas in room 8 after crossing that mark, that the defendant in error would still be liable on account of the death of the intestates of plaintiff in error, because in their utmost significance these facts would establish no more than that the negligence of fellow servants combined with the negligence of the master to cause the injury. Flick and Kellly were fellow-servants of the intestates of plaintiff in error, but the fact that they were guilty of negligence, if such were the fact, would not in this case release the defendant in error from liability

In the case of the *Grand Trunk Railway Co. vs. Cummings*, Chief Justice Waite said:

> At the close of the case on both sides the court gave to the jury sundry instructions, not excepted to, and then, at the request of Cummings, instructed them further, "that, if Noyes (the person claimed to be a co-ser-

vant) was negligent, and if the company was also wanting in ordinary care and prudence in discharging their duties, and such want of ordinary care contributed to produce the injury, and the plaintiff did not know of such want of ordinary care and prudence, the defendant would be liable: that if two of those causes contributed, the company would be liable; that the mere negligence of Noyes, of itself, does not exonerate them, if one of their own faults contributes." * * *

In the instruction which was given we find no error. It was in effect that if the negligence of the company contributed to, that is to say, had a share in producing the injury, the company was liable, even though the negligence of a fellow-servant of Cummings was contributory also. If the negligence of the company contributed to, it must necessarily have been an immediate cause of the accident, and it is no defense that another was likewise guilty of wrong.

Upon the first review of these cases, the supreme court of New Mexico said:

There is no lack of recognition by us of the well established doctrine that when there is combined negligence of employer and fellow-servant, the master is liable for injury inflicted in the course of employment, but the cases we have referred to show, even if we consider failure of duty in this case on the part of the mine owner, that if such failure is known and acquiesced in without complaint and is efficient proximate cause of the injury, the servant is precluded from recovery. * * *

It is preferred, therefore, to place our conclusion upon the ground that the master in this case is not shown to be guilty of negligence of which plaintiff's intestate can complain, as he accepted, or at least there is

> evidence tending to show that he accepted employment with an implied waiver as to there being standing gas in places in said mine, provided they were guarded by a danger signal. If injury resulted from a fellow-servant's act or negligence under such circumstances such injury must be considered to have arisen from the risk incident to the employment.
>
> *C. C. R. R. Co. vs. Deserant, 49 Pac., 810.*

The instruction complained of clearly ignores the rule of law laid down in the Cummings case. It is more seriously objectionable because of the fact that it attempts to apply the doctrine of assumption of risk, without requiring the jury to find as a fact that deceased had any knowledge or means of knowledge of the obstructed air-course and of the existence of a dangerous body of gas in room 8.

A very recent decision of this court negatives the proposition laid down in this instruction in a most positive manner:

> But no reason can be found for, and no authority exists supporting, the contention that an employe, either from his knowledge of the employer's methods of business or from a failure to use ordinary care to ascertain such methods, subjects himself to the risk of appliances being furnished, which contain defects that might have been discovered by reasonable inspection. The employer on the one hand may rely on the fact that his employe assumes the risk usually incident to the employment. The employe on the other has the right to rest on the assumption that appliances furnished are free from defects discoverable by proper inspection, and is not submitted to the danger of using appliances containing such defects because of his knowledge of the general methods adopted by the employer in carry-

ing on his business, or because by ordinary care he might have known of the methods, and inferred therefrom that danger of unsafe appliances might arise. The employe is not compelled to pass judgment on the employer's methods of business or to conclude as to their adequacy. He has a right to assume that the employer will use reasonable care to make the appliances safe and to deal with those furnished relying on this fact, subject of course to the exception which we have already stated, by which where an appliance is furnished an employe, in which there exists a defect known to him or plainly observable by him, he cannot recover for an injury caused by such defective appliance, if with the knowledge above stated, he negligently continues to use it. In assuming the risk of the particular service in which he engages, the employe may legally assume that the employer, by whatever rule he elects to conduct its business, will fulfil his legal duty by making reasonable efforts to furnish appliances reasonably safe for the purposes for which they are intended; and whilst this does not justify an employe in using an appliance which he knows to be defective, or relieve him from observing patent defects therein, it obviously does not compel him to know or investigate the employer's modes of business, under the penalty, if he does not do so, of taking the risk of the employer's fault in furnishing him unsafe appliances. * * *

In Missouri Pac. Ry. Co. v. Lehmberg, 75 Tex. 67, the court considered a refusal to give a requested instruction, that if there were "any patent defects in the engine or tanks, and deceased knew, or might by ordinary diligence have known, of same, and said defects caused, or contributed to the injuries complained of, jury should find

for defendants." The court said:

* * * "Without now considering the question whether the rule in this respect charges an employe with knowledge of defects except with regard to such appliances or instruments as he is engaged himself in using, we think it sufficient to say that the law does not, under any circumstances, exact of him the use of diligence in ascertaining such defects, but charges him with knowledge of such only as are open to his observation. Beyond that he has the right to presume, without inquiry or investigation, that his employer has discharged his duty of furnishing him with safe and proper instruments and appliances."

Indeed, the ultimate result of the argument of the plaintiff in error is to entirely absolve the employer from the duty of endeavoring to supply safe appliances, since it subjects an employe to all risks arising from unsafe ones, if the business be carried on by the employer without reasonable care, and the employe knew, or by diligence, could have known, not of the dangers incident to the business, but of the harm possibly to result from the employer's neglectful methods. Measured by the principles just stated the trial court not only did not err in striking out parts of the instructions which were asked, but in the portions given stated the law to the jury more favorably to the plaintiff in error than was sanctioned by true legal principles."

Texas & Pacific Ry. vs. Archibald, 170 U. S. 672-3-4.

The rule is settled that if a servant, knowing the hazards of his employment as the business is conducted is injured while engaged therein, he cannot maintain an action against his employer for such injury merely because the business might have

been carried on in a safer mode. But if there are increased perils in the business, by reason of the use of defective appliances or otherwise, known to the master or for which he is responsible, and unknown to the servant, if the latter is injured thereby, and is free from negligence, the master is liable.

Behm vs. Armour, 58 Wis. 1.
Cowan vs. Railroad Company, 80 Wis. 284.
Grand Trunk Ry. Co. vs. Cummings, 106 U. S. 701.
Cerrillos Coal R. R. Co. vs. Deserant, 49 Pac. Rep. 810.
The Joseph B. Thomas, 81 Fed. Rep. 278.
Valley Ry. Co. vs. Keegan, 87 Fed. 849.
N. Y. & C. Ry. Co. vs. O'Leary, 93 Fed. 741.

V.

Instruction number ten given at the request of counsel for defendant in error is erroneous.

That instruction is as follows:

The burden of showing negligence on the part of the defendant, that caused the death of the persons for which this action is brought, is upon the plaintiffs, and evidence has been introduced for the purpose of showing an obstruction of the air-course through which that portion of the mine where the deceased persons worked was ventilated. The presumption is that the mine was properly and sufficiently supplied with air, unless the evidence offered establishes the contrary, and to do this the jury must find not only a partial obstruction of the air-course, but that the obstruction was of such a nature and to such an extent as to prevent the passage of the necessary quantity of air, and if upon the whole testimony the jury believe

that notwithstanding the partial obstruction existed, there still was space enough in the air-course unobstructed to allow the proper and sufficient ventilation of the mine and of the fourth left entry where such deceased persons were at work, you will find a verdict for the defendant, unless you find from the evidence that the negligence of the defendant in some other way caused or contributed to the death of said persons.

The act of congress required the defendant in error to provide an adequate amount of air to dilute and render harmless and expel from the mine the noxious and poisonous gases. It also required that this quantity of air should be forced by proper appliances or machinery to each and every working place in the mine and that all workings should be kept clear of standing gas.

Fire damp such as was exploded in the White Ash Mine explodes only when mixed with atmospheric air. Unless the proportion of air is five times greater than the volume of gas, the mixture will not explode. If the proportion of air be more than thirteen times as much as the volume of gas, the mixture will not explode. The highest explosive force is had when one part of gas is mixed with nine to ten parts of atmospheric air.

This instruction tells the jury that if the obstruction in the air-course was not sufficient to prevent the passage of a necessary quantity of air, they may disregard the obstruction in the air-course as an element of neglect in the case. It ignores the statutory duty and withdraws from the attention of the jury the fact that the failure of the defendant in error to do the things required by the statute to be done is negligence *per se*.

It may be that there is a presumption that the mine was properly supplied with air, but that presumption

is entirely overthrown by the mere fact of a gas explosion, and also by the undisputed fact that a dangerous body of gas had been standing in room 8 of the fourth left entry for more than forty-eight hours before the explosion.

The instruction was misleading and prejudicial to plaintiff in error. It is especially objectionable when taken in connection with the Eighth and Twelfth paragraphs of the charge of the court, both of which, as originally given, were more favorable to defendant in error than it was entitled to, and both of which are necessarily limited and qualified by the instruction complained of.

While it may be true in some instances that the neglect of a statutory duty is but evidence of negligence and does not constitute negligence *per se*, it is equally true, and the courts uniformly hold, that where the duties imposed are imposed in furtherance of the public policy of the State, any violation of such duty from which injury occurs, is negligence *per se*.

This doctrine is carried so far as to avoid all contracts made with a view to limit liability for breaches of such duties.

Tiedman on Lim. Pol. Power, Sec. 98.
1 Thom. on Neg. 558.
Carroll v. R. R. Co., 38 Iowa, 122.
Reynolds v. Hinaman, 34 Id. 146.
Railroad Co. v. Stinger, 78 Penn. St. 225.
Messenger v. Pate, 42 Iowa, 445.
Railroad Co. v. McDonald, 152 U. S. 281.
Railroad Co. vs. Reesman, 60 Fed. 376.
Sommer vs. Coal Co., 89 Fed. 56-7.

VI.

Instruction number eleven, given at the request of counsel for defendant in error, in effect told the jury

that if Flick and Kelly were found dead in room number 8, they should find a verdict for the defendant.

That instruction was as follows:

> If the jury shall believe from the evidence that the defendant permitted fire gas to accumulate in room eight of its mine, and that such gas would not produce any injury until ignited, and that it was ignited by Flick and Kelly or either of them, by going into said room with a naked light *(contrary to the rules and orders of the defendant)*, and by such naked light the fire gas was ignited and exploded causing the death of plaintiff's intestates, such explosion and injury were directly and immediately caused by the act of the fellow servants of plaintiff's intestates, and not by the negligence of the defendant, and defendant is not liable therefor, and a verdict should be rendered for the defendant.

There was no evidence from which the jury could infer that Flick and Kelly went into room number 8 contrary to any rule or order of the defendant company unless it can be said that the placing of the fire-mark by the fire-boss was such rule or order.

The uncontradicted evidence shows that Flick and Kelly went into room No. 8 in company with the Pit Boss Donahoe as the bodies of the three men were found within a few feet of each other immediately after the explosion. The only rule bearing upon the subject, if written rules are contemplated by the instruction, is Rule 17:

> "All employes are requested to report any unsafe place to the mine boss, who shall at once have the same repaired and permit no one to enter therein until it is put in proper condition. Reckless persons, or those having no knowledge of mining, will not be permitted in the mine. The mine boss will personally examine the mine

and know all parts thereof are in safe condition." *(Trans. p. 213.)*

The evidence affirmatively shows that Donahoe knew that room 8 contained standing gas, but there is no evidence that either Flick or Kelly had any such knowledge. Flick and Kelly performed their labors under the immediate direction of Donahoe. There is not in this record one word of evidence from which the jury was authorized to infer that Flick and Kelly went into that room contrary to any rule or order of the defendant company unless they were authorized to make the inference from the mere fact that they were found dead in the room in company with Pit Boss Donahoe.

The instruction is evidently based upon a decision of the supreme court of West Virginia which is referred to and quoted from in the first opinion of the supreme court of New Mexico in this case.

The rule laid down in the West Virginia case was doubtless sound as applied to the facts of that case, but the instruction complained of is clearly erroneous because it was based on a supposed or conjectural state of facts of which there was no evidence.

> Correct instructions, if applicable to the case, the court, as a general rule, is required to give, unless the same are in substance and effect embodied in those previously given by the court to the jury; but the court is never required by law to give an instruction to the jury which is not applicable to the case even though it be correct as an abstract principle or rule of law; and it may be added that no prayer for instruction, whether presented by the plaintiff or the defendant, can be regarded as applicable to the case when it is wholly unsupported by the evidence introduced to the jury.
>
> Competent evidence may be written or oral, direct or circumstantial, but when

there is no legal evidence of any kind to support the theory of fact embodied in a prayer for instruction, whether presented by the plaintiff or the defendant, the instruction should always be refused; and such a ruling can never become a good cause for reversing the judgment. It is clearly error in a court, said Taney, C. J., to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered, as the instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the fact hypothetically assumed in that way by the court, and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to a correct conclusion, but its tendency is to embarrass and mislead them, as it may induce them to indulge in conjectures instead of weighing the testimony. When a prayer for instruction is presented to the court, and there is no evidence upon the subject in the case, for the consideration of the jury, it ought always to be withheld, and if it is given under such circumstances, it will, as a general rule, be regarded as error in the court, for the reason that its tendency may be, and often is, to mislead the jury by withdrawing their attention from the legitimate points of inquiry involved in the issue.

Per Mr. Justice Clifford in *Insurance Company vs. Baring, 20 Wall. 161.*

Michigan Bank vs. Eldred, 9 Wall, 553.

Jones vs. Van Beuthysen, 103 U. S., 87.

St. Louis, etc. Co. vs. Spencer. 71 Fed. Rep., 93.

R. R. Co. vs. Houston, 93 U. S., 793.

N. W. Mu. Life Ins. Co. vs. Stevens, 71 Fed. R., 263.

New York etc. Co. vs. Blessing, 67 Fed., 281.

Boston and M. R. R. Co. vs. McDuffey, 79 Fed., 942.
Chicago vs. Robbins, 2 Black, 429.
Blackburn vs. Crawford, 3 Wall., 194.
Keyser vs. Hitz, 133 U. S., 147.
Northern Pacific R. R. Co. vs. Payne, 119 U. S., 561.

VII.

The Court should have charged the jury upon the theory that Flick and Kelly went into room eight in company with Donahoe and under his direction.

The eighteenth and nineteenth assignments of error may be considered together as the error complained of in each of them is of the same nature. The uncontradicted evidence in the case showed that Flick and Kelly performed their duties in the mine under Donahoe's immediate orders and that they were found dead in the same room with him. Yet the court, in its charge and in the instructions given at the request of defendant in error, utterly ignores this phase of the case. Donahoe's name is not mentioned in the charge nor in the instructions given at the request of defendant's counsel. The jury were as well authorized upon the evidence to infer that Donahoe ignited the gas as that either Flick or Kelly did, but the jury were not told, as they should have been, that if Donahoe directed or permitted Flick and Kelly to go into room 8 with naked lights, he knowing of the existence of gas in the room and they being ignorant of such existence, Donahoe was guilty of negligence which was imputable to the defendant.

This case does not present the necessity for any refinement of reasoning either upon the fellow-servant doctrine or upon the doctrine of assumption of risk. The supreme court of New Mexico says in effect that

Donahoe, Flick and Kelly were all fellow-servants of the deceased and that the liability of defendant in error, or rather the want of liability, is the same whether the gas was ignited by Donahoe, Flick or Kelly. But Donahoe was the person mentioned in Rule 17, to whom unsafe places were to be reported, who was to personally examine the mine and know that all parts thereof were in safe condition, and who was to permit no person to enter a place reported to be unsafe until it had been put in proper condition.

We beg to repeat the provisions of Rule 17:—

> "All employes are requested to report any unsafe place to the mine boss, who shall at once have the same repaired and permit no one to enter therein until it is put in proper condition. Reckless persons, or those having no knowledge of mining, will not be permitted in the mine. The mine boss will personally examine the mine and know all parts thereof are in safe condition." *(Trans. p. 213).*

We respectfully submit that the docrine laid down by the court below, is in direct conflict with every decision of this court from the case of Hough to the present time; but if it were true that Donahoe, Flick and Kelly were all fellow servants of the deceased, the liability of the defendant in error would still be beyond dispute under the doctrine of the Cummings case.

No decision of this court warrants the contention that deceased assumed the risk that the mine boss would permit or order their fellow servants to enter with a naked light a room known to him to contain a dangerous body of standing gas, nor that the mine boss would himself, in company with others, enter such a room under like conditions. On the contrary, the cases in which this Court has held that the servant does not assume such risk are too numerous for

citation. Many of them have already been cited in other parts of this brief.

Central R. R. Co. vs. Keegan, 160 U. S. 264.
Railway Co. vs. Baugh, 149 U. S. 368.

VIII.

There is irreconcilable conflict between the charge of the court and the instructions given at the request of Counsel for Defendant in error.

For the purpose of convenience in comparing the charge and the instructions we print them in double columns, as follows:

FROM CHARGE OF COURT.

10.

I charge you, gentlemen, that it is the duty of the master to use reasonable care and diligence to provide a reasonably safe place in which his servants shall perform their respective duties, and also to use reasonable care and diligence to provide reasonably safe appliances for the protection of his servants, and to use reasonable care and diligence to keep such appliances in a reasonably safe condition for the protection of his servants; and the master cannot, by the delegation of any part of his duty to an agent, or servant, relieve himself of responsibility for injuries to his servants arising from the neglect of this duty. Any agent or servant of the master, appointed by him for the purpose of looking to the safety of such appliances, without regard to the rank or station of such agent, or servant, is the representative of the master for such purpose, and the negligence of any such agent or servant in such matters is, in contemplation of the law, the negligence of the master, and the master is liable for any damage occasioned thereby.

INSTRUCTIONS GIVEN AT REQUEST OF COUNSEL FOR DEFENDANT IN ERROR.

I.

The jury are instructed that what was required of the defendant in the conduct of its mining business, in caring for the miners employed by and engaged in working its mine, was the adoption and use of appliances and methods reasonably sufficient for the protection of the miners against any dangers attending the operation of its mine, that were obvious or might with reasonable diligence have become known; and in the absence of evidence to the contrary, it is presumed that the defendant performed its entire duty toward the miners in that respect.

6.

Although the jury may believe from the evidence that gas of the quantity mentioned in the evidence had accumulated and was allowed to remain in room eight for the time stated in the evidence, and believe from the evidence that the explosion testified to originated in room eight, and further believe from the evidence that signals of the kind

11.

Although you may believe from the evidence that the fellow servants of the deceased by their negligence contributed to the bringing about of the explosion in which deceased were killed, yet if you also believe from the evidence that the negligence of defendant also contributed to the same result, you must find a verdict in favor of plaintiff unless you believe from the evidence that plaintiff's intestates or one of them knew or had means of knowledge of such negligence of the defendant, and, notwithstanding such knowledge or means of knowledge, continued to work in the mine of defendat.

12.

The law requires that the defendant shall keep the workings in its mine clear of standing gas, and if you believe from the evidence the defendant failed to keep the workings in its mine clear of standing gas, and that such failure contributed to the deaths of the deceased then you are justified in believing defendant guilty of negligence and must find a verdict in favor of the plaintiff, unless you believe from the evidence that the plaintiff's intestates or one of them knew of the existence of such gas and continued to work in the mine of defendant with such knowledge.

13.

If the jury believe from the evidence that the plaintiff's intestates knew or had reason to know that dangerous bodies of gas were permitted to accumulate in the open places of defendant's mine and to remain for a period of thirty-six hours or more, without any effort on the part of the agents and the servants of said defendant to described in the evidence warning against entry into said room were placed in such a manner as to be observed by the deceased Flick and Kelly, and the meaning and significance of such signal was understood by them and such signal known to be in use by the miners engaged in working in said mine, and that the use of such signal was understood by such miners to inform them of the presence of gas in dangerous quantity, then if the jury believe from the evidence that such explosion was caused by Flick and Kelly entering said room with a naked light, the defendant is entitled to and you should render a verdict in its favor.

10.

The burden of showing negligence on the part of the defendant, that caused the death of the persons for which this action is brought is upon the plaintiffs, and evidence has been introduced for the purpose of showing an obstruction of the air-course through which that portion of the mine where the deceased persons worked was ventilated. The presumption is that the mine was properly and sufficiently supplied with air, unless the evidence offered establishes the contrary, and to do this the jury must find not only a partial obstruction of the air-course, but that the obstruction was of such a nature and to such an extent as to prevent the passage of the necessary quantity of air, and if upon the whole testimony the jury believe that notwithstanding the partial obstruction existed there still was space enough in the air-course unobstructed to allow the proper and sufficient ventilation of the mine and of the fourth left entry where such deceased persons were at work, you will find a verdict for the defendants, unless you find

move the same, and that no precautions against the explosion of such gases were accustomed to be taken except to mark the open place where such gas might be with a danger mark, and plaintiff's intestates, notwithstanding such knowledge or means of knowledge continued to work in said mine, the plaintiff's intestates thereby assumed the risk incident to such method and can not recover if their fellow servants ignited such gas by going over or disregarding such fire mark.

14.

If you believe from the evidence that the explosion originated in room eight of the fourth left entry of the mine in consequence of the accumulation in said room of a body of dangerous gas, merely guarded by a fire mark or danger signal for thirty-six or forty-eight hours before the explosion, and that plaintiff's intestates did not consent or agree to work in said mine with places dangerous because of gas merely guarded by fire marks or danger signals for thirty-six or forty-eight hours, then plaintiff is entitled to recover in each case, although you may also believe that said body of dangerous gas was ignited by the negligence of fellow servants of plaintiff's intestate.

from the evidence that the negligence of the defendant in some other way caused or contributed to the death of such persons.

11.

If the jury shall believe from the evidence that the defendant permitted fire gas to accumulate in room eight of its mine, and that such gas would not produce any injury until ignited, and that it was ignited by Flick or Kelly or either of them, by going into the said room with a naked light, *contrary to the rules and orders of the defendant*, and by such naked light the gas was ignited and exploded, causing the death of plaintiff's intestates, such explosion and injury were directly and immediately caused by the act of the fellow servants of plaintiff's intestates, and not by the negligence of defendant, and defendant is not liable therefor; and a verdict should be rendered for the defendant.

It is impossible to read these two sets of legal propositions and conclude that both of them correctly state the law of the same case. The giving of two or more instructions which are inconsistent with each other is calculated to mislead the jury and leave them in doubt as to the law. How were the members of the jury to reconcile these differences and select from these conflicting propositions the correct principles by which they should be guided? It is

highly probable that no two men on this jury understood, alike, the law of the case as given by the trial judge, and it is certain that no man can take the charge and the instructions given on request of counsel for defendant in error, and reconcile the conflicting principles contained in them. There is a manifest conflict between instructions numbers six and eleven, given at the request of counsel for the defendant in error.

If the rules and orders of the defendant company mentioned in instruction No. 11 contemplate anything else than the rules and orders forbidding any person to cross over a fire mark or danger signal, there is not even a suggestion in the record from which the jury could infer that any such rule or order was violated, and for that reason instruction No. 11 ought not to have been given. If, however, the rules and orders there referred to contemplate the rule forbidding every person to cross over a fire mark or danger signal, instruction No. 6 given at the request of counsel for defendant in error, covered that aspect of the case and was, as has already been shown, much more favorable to defendant in error than is justified by correct legal principles.

In addition to all of this, there is not in the record any evidence to justify either instruction No. 6 or instruction No. 11, given at the request of counsel for defendant in error, unless they be justified by the bare fact that Flick and Kelly were found dead in room No. 8. Certain it is that no witness testified that either Flick or Kelly disobeyed any order or any rule or crossed over a danger signal, and there was no circumstance or combination of circumstances in evidence from which the jury might infer any of these things.

Bank of Metropolis vs. New England Bank, 6 How. 226.

Wenning v. Teeple, 41 N. E., (Ind.) 600.
Mooar vs. Harvey, 125 Mass. 574.
Union Bank of Trenton v. 1st Natl. Bank, 2 Mo. App. 458.
Bleiler v. Moore, 69 N. W. 164.
Hohen vs. Burlinglon R'way Co., 20 Iowa 562.
Railroad Company vs. Payne, 49 Ill. 499.
Nichols vs. Jones, 32 Mo. App. 667.
Quinn vs. Donovan, 85 Ill. 196.
Haight vs. Vallet, 89 Cal. 245.
Pumphay vs. Walker, 75 Iowa 408.

IX.

It was error to deny the motions for new trial.

We freely concede that the action of the court, in denying a motion for new trial, is not, ordinarily, assignable for error, or subject to review on writ of error, but we contend that we are entitled to have the action of the court refusing new trials to plaintiff in error, reviewed because that court refused to exercise its discretion on the motion, and ordered it to be certified upon the record "that said motion is overruled upon the ground that there was a conflict of evidence in the cases and this court is of opinion that in such a case it has no discretion to set aside the said verdicts as against the weight of the evidence " *(Trans. p. 30).*

This amounts to a declaration by the trial judge that in his opinion the verdicts were against the weight of the evidence and that he would have granted the new trial upon that ground if he had believed he had the power to do so. The common law power of a *nisi prius* judge in his discretion to set aside a verdict which is contrary to the weight of evidence, has been the subject of some controversy in recent years and some very able lawyers and judges have contended that a judge who refused to direct a ver-

dict at the close of the evidence, was without power to set aside, as against the weight of the evidence, a verdict rendered by a jury after such refusal. The learned judge adopted this view of his duty in these cases. We submit, however, that this is an erroneous view of the duty and responsibility of the trial judge.

Fortunately for us this question has recently been determined in a way which leaves it no longer open to serious controversy. Judge Taft, speaking for the Circuit Court of Appeals of the 6th Circuit in *Felton vs. Spiro*, said:

> A motion for a new trial is of course addressed to the discretion of the Court, and, if the Court exercises its discretion, and either grants or denies the motion, its action is not the subject of review. This is so well settled that it is unnecessary to cite authorities upon the point. But the motion for a new trial is the remedy accorded to the party litigant for the correction by the trial court of injustice done by the verdict of a jury. It is one of the most important rights which a party to a jury trial has. It is the right to invoke the discretion of the court to decide whether the injustice of the verdict is such that he ought to have an opportunity to take the case before another jury.
>
> * * * * * * *
>
> We come, then, to the question whether a federal court, in which a jury has rendered a verdict, has the power to set aside a verdict, when in its opinion, it is contrary to the decided or overwhelming weight of the evidence, and in the exercise of a legal discretion may properly do so. Upon this point we have not the slightest doubt. This court in *Railway Co. vs. Lowery, 20 C. C. A., 596, 74 Fed. 463*, has already decided it. In an elaborate and most care-

fully considered opinion, Judge Lurton, speaking for the court, points out the distinction between the insufficiency, in law, of evidence to support an issue which will justify a peremptory instruction by the court, and that insufficiency, in fact, of evidence, when weighed with opposing evidence, which, while not permitting a peremptory instruction, will justify a court in setting aside a verdict based on it, and in sending the parties to another trial before another jury. The cases in England and in this country are reviewed at length by Judge Lurton, and the conclusion reached is fully supported by authority.

It may therefore be fairly claimed that these verdicts come into this Court for review lacking an absolutely essential element of validity, namely, the concurrence of the trial judge. It is true that the trial judge entered judgment upon these verdicts, but, before doing so and for the preservation of the rights of the plaintiff in error, he caused to be certified upon the record the fact that he believed himself to be without authority to withhold his concurrence upon the ground that the verdicts were contrary to the weight of the evidence. The supreme court of New Mexico did not specifically pass upon the question here sought to be presented, but held, as matter of law, not only that there was no conflict in the case such as justified the sending of the case to a jury, but also that as a matter of law the evidence was insufficient to establish negligence on the part of the defendant in error.

We submit that plaintiff in error upon this state of the record has a right to have this action of the trial judge reviewed, unless this court shall be of opinion that the supreme court of New Mexico is right in its conclusion that, upon all of the evidence, a verdict should have been directed for the defendant in error.

If that conclusion is correct, the plaintiff in error has not been prejudiced by the action of the trial judge here complained of.

United States vs. Maddox, 146 U. S., 140.
Felton vs. Spiro, 78 Fed. Rep., 581.
Railroad Co. vs. Lowry, 74 Fed. Rep., 417.
Insurance Co. vs. Randolph, 78 Fed. Rep., 760.

X.

The supreme court of New Mexico was in error in holding that the trial judge should have directed a verdict in favor of defendant in error.

Out of abundant caution we have assigned for error each of the several propositions laid down by the supreme court of the Territory of New Mexico in its opinion, although we are not at all sure that in so doing we will have succeeded in giving any additional aid to this court in its examination of the case or any additional information to counsel for the defendant in error as to the points upon which we rely for reversal of the case in this court. We think we have sufficiently shown such errors on the part of the trial court as entitled us to a reversal by the supreme of the Territory, and shall confine ourselves, in the discussion of the last nine assignments of error, to an effort to show that the supreme conrt of the Territory is in error in holding that the trial judge should have directed a verdict in favor of the defendant in error.

We shall not attempt to review the evidence in the case, but respectfully invite the attention of the court to that part of the statement contained in this brief in which we set forth what we contend is established beyond controversy.

If there be any conflict in the evidence upon these points the learned counsel for defendant in error will,

undoubtedly, point out in his brief how the conflict arises, and where, in the record, the evidence of such conflict is to be found. We insist that there is no such conflict, and that counsel for defendant in error admitted, by moving for a peremptory instruction at the close of the case, that no conflict existed.

We further insist that plaintiff in error was entitled to a direction to the jury that, upon the undisputed facts, defendant in error was guilty of negligence as a matter of law and that nothing should have been left to the jury except the question of damages.

The supreme court of New Mexico seems to have been of the opinion that we did not show with sufficient certainty how the explosion was caused or where it originated, but we submit that the evidence adduced was not legally insufficient because no witness was produced who could testify from his own knowledge, by reason of having witnessed the explosion, to these things.

Counsel for defendant in error by asking the court to give instruction No. 6 and instruction No. 11, must certainly be held thereby to admit that there was evidence from which the jury might infer that the explosion was occasioned by the accumulation of a dangerous body of gas in room 8 of the fourth left entry and originated there, and he must likewise be held to admit, by asking for instruction number 10, that there was evidence from which the jury were authorized to infer that the air-course was obstructed by water, and it is difficult to understand upon what theory it can be contended that the jury might not, from these circumstances, find that the defendant in error was guilty of negligence. Indeed, it is not too much to claim that the inference of negligence follows as matter of law from the existence of these facts. There were, however, physical conditions

found in the mine after the explosion which preclude any reasonable contention that the agents of defendant in error charged with the duty of looking to the safety of the deceased, were not guilty of criminal negligence. The burned and broken bodies of the twenty-three persons found in the fourth left entry, the burning of the props in all the rooms from 8 all the way around to the point in the air-course where the water had accumulated, taken in connection with the absence of any evidence of flame from room 8 toward the main slope and the plane showed clearly the course of the flame and pointed with unerring certainty to the initial point as well as to the character of the explosion. They certainly satisfy all legal requirements as to the sufficiency of the proof. Yet, in addition to all this, the undisputed facts are that every man in the fourth left entry of that mine at the time of the explosion, except the men working on the plane, was killed, while the men on the plane came out uninjured. How did they escape? They escaped because they were receiving their ventilation through the opening in the upper air-course which had been made two weeks before the explosion. If they had depended for their ventilation upon the air which passed through the air-course of the fourth left entry, they would have perished from the afterdamp.

The circumstance that the after-damp passed into the air-course of the third left and did not reach the plane, is conclusive. There was a break-through from room 6 of the fourth left entry to the air-course of the third left entry, and the "after-damp" found its way through that opening and killed a driver and a pair of mules in that entry, but there is no evidence of after-damp on the plane of the fourth left and the men working there were uninjured.

If the plaintiff in error had been under obligation to establish beyond a reasonable doubt the cause and initial point of this explosion, the evidence in this case would meet that requirement, but to sustain the rulings of the supreme court of New Mexico under discussion, this Court must not only hold that the evidence was not sufficient to establish the cause and initial point of the explosion, but must go farther and hold that it was so insufficient that all reasonable men must concur in the conclusion that it is impossible from the evidence to tell where this explosion originated or how it was occasioned.

We respectfully submit that a case establishing criminal negligence by more cogent evidence was never presented in a court of justice.

The rule is well established in this Court that a negligence case should never be taken from a jury, if the facts are such that reasonable men may fairly differ upon the question as to whether or not the defendant has been guilty of negligence.

It would be an imposition upon the patience of this Court to attempt to cite and comment upon its numerous decisions in support of this principle. We content ourselves with the suggestion that the question is no longer open to discussion here.

Warner v. B. & O. R. R. Co., 168 U. S. 339.
Chicago Ry. Co. v. Lowell, 151 U. S. 209

We respectfully submit that the judgment of the supreme court of New Mexico should be reversed.

FRANK W. CLANCY,
NEILL B. FIELD,
Counsel for Plaintiff in Error.